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In the Supreme Court of the United States

JAMES OBERGEFELL, ET AL., *Petitioners*,

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL., *Respondents*.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* SERVICES AND ADVOCACY FOR GAY, LESBIAN, BISEXUAL AND TRANSGENDER ELDERS; AMERICAN SOCIETY ON AGING; JUSTICE IN AGING; NATIONAL COMMITTEE TO PRESERVE SOCIAL SECURITY AND MEDICARE; AND NATIONAL HISPANIC COUNCIL ON AGING IN SUPPORT OF PETITIONERS

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Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders ("SAGE"), the American Society on Aging, Justice in Aging, the National Committee to Preserve Social Security and Medicare, and the National Hispanic Council on Aging ("*Amici*") respectfully submit this brief as *amici curiae* in support of the Petitioners.

INTEREST OF AMICI CURIAE

SAGE is the country's oldest and largest organization dedicated to improving the lives of lesbian, gay, bisexual, and transgender ("LGBT") older adults.[1] In conjunction with 27 affiliated organizations in 20 states and the District of Columbia, SAGE offers supportive services and consumer resources to LGBT older adults and their caregivers, advocates for public policy changes that address the needs of LGBT older people, and provides training for agencies and organizations that serve LGBT older adults. As part of its mission, SAGE provides services to LGBT older adults who seek to marry, grow old with, care for, and ultimately be recognized as the surviving spouse of the person they most love. Given its extensive work with LGBT elders, SAGE is uniquely positioned to address the severe adverse effect that denial of marriage rights has on older same-sex couples.

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[1] Pursuant to Rule 37.6, *Amici* hereby state no counsel for any party authored the brief in whole or in part and no person or entity, other than the *Amici*, their members, or their counsels, made any monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a). Copies of the requisite consent letters have been filed with the Clerk of this Court.

Founded in 1954 as the Western Gerontological Society, the American Society on Aging ("ASA") is a nonprofit association of diverse individuals bound by a common goal: to support the commitment and enhance the knowledge and skills of those who seek to improve the quality of life of older adults and their families. The membership of ASA is multidisciplinary and inclusive of professionals who are concerned with the physical, emotional, social, economic, and spiritual aspects of aging. Because ASA's members wish to enhance the quality of life of all older adults, and because discrimination of any kind erodes quality of life, ASA has an interest in opposing all forms of discrimination.

Justice in Aging is a non-profit organization dedicated to protecting the rights of low-income older adults. For the past 43 years, under its former name, the National Senior Citizens Law Center, Justice in Aging has engaged in advocacy, litigation, and training of local advocates to promote the independence and well-being of the low-income elderly and persons with disabilities, especially disadvantaged minorities, including the elderly LGBT community. The organization's name changed, but its commitment to ensuring older adults access to federal benefits programs has not wavered. Justice in Aging has a vested interest in challenging the constitutionality of laws that deprive same-sex older adults of the right to marriage and the accompanying benefits that help them to live free from the worry and pain that the threat of poverty can bring.

The National Committee to Preserve Social Security and Medicare ("NCPSSM") is a non-profit membership organization with more than three million members and supporters. For 33 years, NCPSSM's mission has been to preserve and protect the financial security, health, and wellbeing of current and future generations of maturing Americans. Our legislative advocacy, policy expertise, and educational outreach have focused on the preservation, protection, and strengthening of programs and benefits that ensure access to adequate economic and health care security during retirement or disability. As an organization whose membership includes individuals from the LGBT community who are currently being denied their constitutional rights by several states, NCPSSM has a vested interest in challenging this unconstitutional discrimination which threatens the retirement security of these members.

The National Hispanic Council on Aging ("NHCOA") is the leading national organization working to improve the lives of Hispanic older adults, their families, and their caregivers. For more than 30 years, NHCOA has been a strong voice dedicated to promoting, educating, and advocating for Hispanic Americans in the areas of economic security, health, and housing. In light of the rapid growth of the Latino aging population, NHCOA provides leadership development to empower Hispanic older adults and families to age with dignity and become their own best advocates. Given its extensive work with Hispanic elders, including those who are LGBT, NHCOA is uniquely positioned to address the adverse impact that denial of marriage rights has on older same-sex couples.

SUMMARY OF THE ARGUMENT

Every week, in every state in the union, government officials issue marriage licenses to a substantial number of older couples. Thirteen states, however, refuse to issue marriage licenses to a small minority of older couples: those couples in which both members are of the same sex. These states also refuse to recognize the marriages of same-sex couples lawfully performed in other states.

The states' refusal to license or recognize the marriages of same-sex couples deprives these couples of state and private benefits that are especially important to older adults, such as the right to make critical healthcare decisions for an incapacitated spouse, to receive survivor's benefits under a spouse's corporate retirement plan, or to inherit a marital home from a deceased spouse. Because many older same-sex couples lack the financial or physical ability to travel to another state to be married, they also continue to be ineligible for the panoply of federal benefits that are available only to married couples. Moreover, even after *Windsor*, many lawfully married older same-sex couples continue to be denied important federal benefits – including Social Security and Veterans' Spousal Benefits – because the state in which they live does not recognize their marriage.

The states' exclusion of same-sex couples from marriage also deprives older same-sex couples of the intangible benefits that marriage has long provided to older heterosexual couples. As a result of the recognition, security, and mutual support that marriage provides, older married couples typically

live healthier, happier, longer, and more prosperous lives than their unmarried peers. Because LGBT elders often have greater health-related and financial needs and weaker social support networks than other elders, they could benefit from marriage even more than other older adults.

The states' primary justification for excluding same-sex couples from marriage is that, because same-sex couples cannot procreate, there is no reason for a state to "solemnize" and "subsidize" their unions. *DeBoer v. Snyder*, 772 F.3d 388, 407 (6th Cir. 2014). However, even if restricting the benefits of marriage to couples who are capable of procreation were a legitimate end, prohibiting same-sex couples from marrying is not a rational means to do so. To the contrary, allowing a substantial number of older heterosexual couples to marry *despite* being incapable of procreation, while denying a far smaller number of older same-sex couples the right to marry *because* they are incapable of procreation, is self-evidently irrational.

The need for the Court to protect the constitutional rights of older same-sex couples – many of whom are advanced in years and in declining health – is especially great. If the Court does not do so, older same-sex couples will be forced to continue to wait until the day, if ever, when the states choose to rescind their unconstitutional marriage restrictions. Even if that day arrives eventually, it will have come too late for many of them.

Amici therefore respectfully submit that the Court should find that, even under the most deferential standard of review, the states' refusal to license or recognize the marriages of same-sex couples denies same-sex couples – and, in particular, older same-sex couples – their right to equal protection under the law.[2]

ARGUMENT

I. Excluding Same-Sex Couples From Marriage Deprives Them Of Access To Federal, State, And Private Benefits That Are Especially Important For Older Adults

A. Older Same-sex Couples Who Live in States That Do Not Allow Them to Marry, Or Do Not Recognize Their Lawful Out-of-State Marriages, Are Denied Important State and Private Benefits

Same-sex couples who live in a state that does not permit them to marry, or that does not recognize their lawful out-of-state marriage, are deprived of a multitude of state and private benefits available to

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[2] While *Amici* believes that the prohibition against marriage by same-sex couples is not rationally related to any legitimate government objective, *Amici* agree with Petitioners that the Court should apply heightened scrutiny and that the deprivation of the right to marry also deprives same-sex couples of the liberty interest protected by the Fourteenth Amendment. *See DeBoer* Petr's Br., No. 14-571, at 50-57; *Obergefell* Petr's Br., No. 14-556, at 32-48.

married couples.[3] This has created particular hardships for older same-sex couples. While married heterosexual couples can fulfil their vow to care for each other "in sickness and in health . . . until death do us part," older same-sex couples may be unable to care for each other in sickness or to provide for the survivor after death has parted them.

In Tennessee, for example, a heterosexual spouse has first priority to make decisions on behalf of an incapacitated spouse.[4] Should temporary incapacitation turn into permanent incapacity, the spouse has first priority to be appointed conservator.[5] Same-sex couples – including same-sex couples lawfully married in another state – do not have these rights. As a result, a blood relative, even one from whom the incapacitated spouse has

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[3] *See Tanco v. Haslam*, 7 F. Supp. 3d 759, 764, 770 (M.D. Tenn. 2014 (discussing rights available only to heterosexual married couples and/or their children in Tennessee); *see also, Henry v. Himes*, 14 F. Supp. 3d 1036, 1049-50 (S.D. Ohio 2014) (discussing rights and benefits for married couples in Ohio); *Jernigan v. Crane*, No. 4:13-cv-00410, 2014 U.S. Dist. LEXIS 165898, *4-7 (E.D. Ark. Nov. 25, 2014) (same, Arkansas); *Campaign for S. Equal. v. Bryant*, No. 3:14-cv-818, 2014 U.S. Dist. LEXIS 165913, *99-100 (S.D. Miss. Nov. 25, 2014) (same, Mississippi); *Bourke v. Beshear*, 996 F. Supp. 2d 542, 546-47 (W.D. Ky. Feb. 12, 2014) (same, Kentucky).

[4] *See* Tenn. Code Ann. § 68-11-1806(c)(3)(A). The presumption in favor of the spouse is so strong that one spouse can only divest the other spouse of this right by making a written declaration appointing another person as surrogate.

[5] *See id.* § 34-3-103(2).

been long estranged, can be appointed conservator, and can even physically separate the couple.[6]

The disparate treatment continues after death. If a married heterosexual who has no children dies without a will, his widow will automatically inherit the entire estate.[7] In addition, regardless of whether the decedent left a will, a heterosexual widow does not have to pay inheritance tax.[8] Here again, same-sex couples – including same-sex couples lawfully married in another state – do not enjoy these basic rights. As a result, a deceased LGBT person's estate could pass to a distant relative, rather than to his surviving spouse.[9] At the same time, the surviving spouse may be forced to sell the home that the couple

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[6] *See, e.g.*, Brody Levesque, *Texas man, separated by family from partner of 34 years, hopes for reunion*, LGBTQ Nation (May 1, 2013) (http://www.lgbtqnation.com/2013/05/texas-man-separated-by-family-from-partner-of-34-years-hopes-for-reunion/) (after being awarded guardianship of her gay brother who was suffering from Alzheimer's, sister removed him from the home he shared with his long-time partner, placed him in a nursing facility, and barred his partner from having any contact with him).

[7] *See* Tenn. Code Ann. § 31-2-104(a).

[8] *See id.* § 67-8-315(a)(6).

[9] For example, absent a will, if the deceased spouse's parents are not alive and he has no children – a common situation for older LGBT people – the estate would pass to the deceased's siblings. *See* Tenn. Code. Ann., § 31-2-104(b)(3). If the deceased's siblings are not alive, the estate could pass to his nieces, nephews, or even distant cousins rather than to his lawfully wedded spouse. *See id.* § § 31-2-104(b)(3) & (4).

owned together, and where they had planned to live until the end of their lives, in order to pay the taxes due.[10]

Similar situations exist in each of the states that do not recognize the marriages of same-sex couples. For example, Lynn and Monica Serling-Swank, a married couple in their fifties, live in South Dakota, but were legally wed in Connecticut. Because South Dakota does not recognize their marriage, Lynn was unable to visit Monica in the hospital because she was not considered to be a family member. *See Rosenbrahn v. Daugaard*, No. 4:14-cv-04081, 2015 U.S. Dist. LEXIS 4018, *3-4 (D.S.D. Jan. 12, 2015).[11]

Similarly, Frank Colasonti, a retired school teacher living in Michigan, was foreclosed from providing for his spouse, James Ryder, through his pension. Michigan allows newly married retirees to reduce their monthly pension disbursements to provide future pension payments and health benefits

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[10] *See* Susan von Herrmann, *Estate-planning lessons for LGBT families*, S.F. Bus. Times (Sept. 19, 2007) (after the death of her same-sex partner of thirty years, California resident required to sell the couple's home in order to pay the estate tax).

[11] This hospital imposed this restriction notwithstanding federal regulations that give patients the right to be visited by the person of their choice and expressly bar discrimination based on sexual orientation. *See* U.S. Dep't of Health & Human Servs., Ctrs for Medicare & Medicaid Servs., *Medicare and Medicaid Programs: Changes to the Hospital and Critical Access Hospital Conditions of Participation to Ensure Visitation Rights for All Patients*, 42 CFR Parts 482 and 485, 75 Fed. Reg. 70831-70844 (Nov. 19, 2010).

for their surviving spouse. However, because Michigan does not recognize the couple's marriage, Frank's request to adjust his pension was denied. *Caspar v. Snyder*, No. 14-cv-11499, 2015 U.S. Dist. LEXIS 4644, *41-42 (E.D. Mich. Jan. 15, 2015).

A state's refusal to license marriages by same-sex couples also can affect private rights. For example, a company may deny bereavement leave to an employee whose same-sex partner died because the couple was not legally married.[12] Similarly, corporate retirement plans may refuse to provide a survivor's pension to a deceased employee's same-sex partner. At the same time, because a wrongful death action generally can only be brought by the "next of kin," such as the spouse, children, or parents of the deceased,[13] a bereaved LGBT person may not be able to obtain civil damages for the tortious death of her same-sex partner.[14]

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[12] *See Donaldson v. State*, 292 P.3d 364, 377-78 (Mont. Sup. Ct. 2012) (Nelson, J, dissenting) (plaintiff denied bereavement leave by employer after her same-sex partner of eight years, who was employed at the same company, was killed in a work-related accident).

[13] *See, e.g.*, Ohio Rev Code Ann. § 2125.02(A)(1) (wrongful death action may only be brought "for the exclusive benefit of the surviving spouse, the children, . . . the parents . . . [and] the next of kin of the decedent").

[14] *See, e.g., Raum v. Restaurant Assocs., Inc.*, 252 A.D.2d 369, 370 (N.Y. App. Ct. 1998) (member of an unmarried same-sex couple "lack[s] the right to bring a wrongful death action" following the death of his partner).

B. Older Same-sex Couples Who Cannot Travel to a State in Which They Can Marry Continue To Be Denied Important Federal Benefits

The states' refusal to allow same-sex couples to marry also prevents them from enjoying the federal benefits that, following the Court's decision in *United States v. Windsor*, 570 U.S. __, 133 S. Ct. 2675 (2013), are provided to married same-sex couples. As a result, some same-sex couples who live in states that do not permit them to marry have chosen to travel to other states to solemnize their unions. Many have had to overcome great obstacles to do so. For example, Petitioner James Obergefell and his terminally ill partner, John Arthur, chartered a medically equipped airplane to take them to Maryland, where they were wed on the airport tarmac. *See Obergefell* Petr's Br. at 6-7.

Unlike James and John, many older same-sex couples – especially those with serious health or financial constraints – cannot travel to another state to wed. For those couples, *Windsor* changed nothing: They continue to be "denied benefits from the federal government that are granted to married couples (including same-sex couples)." *In re Fonberg*, 736 F.3d 901, 902 (9th Cir. 2013); *see also* Deborah A. Widiss, *Leveling Up After DOMA*, 89 Ind. L.J. 43, 54 (2014) ("[F]or some same-sex couples, requiring travel to a state where they can marry literally puts federal benefits out of reach."). The denial of these benefits increases the costs that older same-sex couples pay for health insurance, prevents them from caring for each other when they are ill, and

reduces their ability to provide for the survivor after one has died.

To start, older same-sex couples who are unable to marry generally must pay more for federally provided medical insurance. Married couples' Medicare Part B premiums are based on their joint income, as reported on their federal income tax return. Because unmarried couples may not file joint tax returns, they must each pay Medicare premiums based on their separate individual incomes, typically resulting in a higher cost. *See* U.S. Dep't of Health & Human Servs., Ctrs for Medicare & Medicaid Servs., *Medicare & You*, at 32-33 (2015) (http://www.medicare.gov/Pubs/pdf/10050.pdf).

The adverse consequences of being unable to obtain federal benefits available only to married couples are even greater if a member of a sex-same couple takes ill or is injured. This is an especially significant concern for older same-sex couples. Given current economic conditions, many people must work well beyond the traditional retirement age,[15] often for very modest wages. At the same

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[15] In 2010, 35.8 percent of men age 65 to 69, 20.9 percent of men age 70 to 74, and 8.6 percent of men 75 and over, were in the workforce. For women, the figures were 26.4, 13.5, and 3.9 percent, respectively. *See* Braedyn Kromer & David Howard, U.S. Census Bureau, *Labor Force Participation and Work Status of People 65 Years and Over*, 2 (Jan. 2013), *available at* http://www.census.gov/prod/2013pubs/acsbr11-09.pdf. Because LGBT elders tend to have lower incomes than their peers, *see infra*, Sec. II.B, they are more likely to have to work past 65. Indeed, in a recent survey conduct by the Harris Company, 44 percent of LGBT people stated they expected to have to work well beyond ordinary retirement age. *See* SAGE, *Out and Visible: The Experiences and Attitudes of Lesbian, Gay,*

time, as they age, older people face an ever-increasing risk that they, or their loved one, will suffer a serious illness or debilitating injury.

Married workers covered by the Family and Medical Leave Act ("FMLA") can take up to 12 weeks of unpaid leave to care for a sick or seriously injured spouse. 29 U.S.C. § 2612(a)(1)(C). By contrast, unmarried couples – even if they have entered into a state-sanctioned civil union – do not have this right.[16] As a result, an unmarried LGBT elder can be fired if he stays home from work to care for his sick or injured partner.

The detrimental effects of being unable to obtain federal benefits persist even after one of the partners has died. For example, federal law provides that when a married person inherits an Individual Retirement Accounts ("IRA") from her spouse, the inherited amount can grow tax-free until the surviving spouse reaches age 70.5. By contrast, an unmarried person who inherits an IRA from her same-sex partner must immediately begin to

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Bisexual, and Transgender Older Adults Ages 45-75, at 8 (2014), *available at* http://www.sageusa.org/files/LGBT_OA MarketResearch_Rpt.pdf.

[16] *See e.g., Garden State Equal. v. Dow*, 79 A.3d 1036, 1043 (N.J. Sup. Ct. 2013) ("Partners in a civil union . . . cannot claim leave under the Family and Medical Leave Act if a partner becomes sick or is injured.").

withdraw money and pay taxes, as if she had received the money from a stranger.[17]

C. Lawfully Married Same-Sex Couples Whose Marriage Is Not Recognized in Their "State of Domicile" Continue To Be Denied Federal Benefits Especially Important to Older Adults

The states' refusal to recognize the lawful marriages of same-sex couples performed out-of-state also means that, even after *Windsor*, many older *married* same-sex couples continue to be denied significant federal benefits – including important Social Security, Medicaid, and Veterans' Benefits. This is because the Social Security Administration and the Department of Veterans Affairs ("VA") base eligibility for these benefits on whether, at the time of application or the time of one of the spouse's death, the couple's marriage was recognized in their "state of domicile."[18]

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[17] *See* 26 U.S.C. § 219(c) (discussing IRA deduction requirements).

[18] The potential loss of these federal benefits can prevent older married same-sex couples who live in a state that recognizes their marriage from relocating to a state to which they would otherwise retire.

1. Social Security Spousal Benefits

Social Security is the primary source of support for many older and disabled Americans.[19] However, because the Social Security Administration uses the "state of domicile" rule, which imports the discriminatory marriage restriction contained in some states' laws, a married same-sex couple (or a surviving spouse) living in a state that does not recognize the couple's marriage may be deemed ineligible for four critical benefits: the Spousal Disability Benefit, the Spousal Retirement Benefit, the Survivor Retirement Benefit, and the Lump-sum Death Benefit.[20]

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[19] Social Security Admin., *Annual Statistical Supplement to the Social Security Bulletin, 2013*, at tables 3.C4 and 3.C5 (Feb. 2014).

[20] The Spousal Disability Benefit pays benefits to the spouse of a disabled worker based on the earning record of the spouse with the higher earnings record. 42 U.S.C. §§ 402(b)(1)(D) & 402(c)(1)(D). The Spousal Retirement Benefit allows a spouse to receive the greater of: (a) half the benefit that his or her spouse earned; or (b) the benefit due from the claimant's own earnings. *Id.* §§ 402(b)(1)(D), (c)(1)(D). The Survivor Retirement Benefit allows a surviving spouse to receive up to 100 percent of a deceased spouse's benefit amount. *Id.* § 402(e)(1)(A), (f)(1)(A). Finally, the Lump-Sum Death Benefit proves a one-time payment of $255 to the surviving spouse. *Id.* § 402(i). *See also* Social Security Admin., GN 00210.002 Same-Sex Marriage - Determining Marital Status for Title II and Medicare Benefits, *available at* https://secure.ssa.gov/poms.nsf/lnx/0200210002 ("[W]e look to the laws of the state of the number holder's (NH's) domicile to determine whether we can recognize the marriage.").

This is exactly what happened when Texas resident Kathy Murphy applied for Social Security Survivor Benefits. For more than thirty years, Kathy and Sara Baker lived together in a committed relationship. Like many couples, they bought a house, shared finances, cared for one another during times of sickness, celebrated with one another in times of health, and were committed to supporting each other until the end of their lives. In 2010, they were married in Massachusetts. That same year, when Sara was 60, she was diagnosed with an aggressive form of cancer. From that point until Sara's death in 2012, Kathy was Sara's primary caretaker. *See Murphy v. Colvin*, Case No. 14-cv-01764 (D.D.C. Oct. 22, 2014), Compl. (DE 1).

Like most widows, Kathy applied for Social Security Spousal Survivor Benefits. Because Texas did not recognize Kathy's lawful marriage to Sara, the Social Security Administration informed Kathy it did not consider her a "widow" and, therefore, denied her claim. *Id.* In addition to the significant emotional distress caused by being told that she would not be recognized as the surviving spouse of her beloved wife, the denial of those benefits caused Kathy significant financial harm. As a result, Kathy was required to start taking Social Security at 62, rather than waiting until 66 as she and her late wife had planned, thereby significantly reducing the amount of her monthly payments for the rest of her life. *Id.*

2. Medicaid Long-Term Care

Older married same-sex couples who live in states that do not recognize their marriage risk

being forced to sell the family home in order to pay the cost of nursing home or other long-term care for one of the spouses.[21] This is because, before Medicaid will pay these costs, a married couple must "spend down" their assets. The Medicaid program, however, has "spousal impoverishment rules" that permit a healthy spouse to keep certain jointly owned property, such as the home the couple live in or the car they drive.[22] Because states are permitted to apply the "state of domicile" rule to determine eligibility for certain Medicaid Benefits,[23] a married same-sex spouse living in a state that does not recognize his marriage may not be able to keep these assets.

3. Veterans' Spousal Benefits

LGBT service members have made great sacrifices for their country – even when their country has rejected and discharged them because of their sexual orientation or gender identity. Today, the VA provides many benefits to our gay, lesbian, and bisexual veterans. At the same time, however, the VA determines eligibility for a number of spousal

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[21] *See* U.S. Dep't of Health & Human Servs., *Spouses of Medicaid Long-Term Care Recipients* (Apr. 2005), *available at* http://aspe.hhs.gov/daltcp/reports/spouses.htm#note5.

[22] *Id.*

[23] U.S. Dep't of Health & Human Serv's, Ctrs for Medicare & Medicaid Servs., "Same Sex Partners and Medicaid Liens, Transfers of Assets, and Estate Recovery" (June 10, 2011).

benefits that are critical for older couples based on the "state of domicile" rule.[24]

Because the VA imports the discriminatory marriage restriction contained in some states' laws, veterans and their same-sex spouses who live in a state that does not recognize their marriage may be denied critical veterans benefits,[25] including spousal medical care.[26] The adverse impact continues even after the veteran has died. The surviving spouse may be denied a spousal pension,[27] and may not be allowed to be buried in a VA cemetery beside his spouse.[28]

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[24] *See* 38 U.S.C. § 103(c) (providing that the VA shall look to "the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued"); Dep't of Veteran Affairs, *Summary of Precedent Opinions of the General Counsel*, 79 Fed. Reg. 35414-35415 (June 20, 2014).

[25] *See generally* Senior Veterans Service Alliance, "Information about Veterans Benefits Available to Senior Veterans and Their Surviving Spouses" (http://www.veteransaidbenefit.org).

[26] *See* 38 U.S.C. § 1781(a).

[27] *See id.* §1541(a).

[28] *See id.* § 2402(a)(5).

II. Denial Of The Right To Marry Deprives Older Same-Sex Couples Of The Intangible Benefits That Marriage Provides To Older Heterosexual Couples

In addition to denying older same-sex couples significant federal, state, and private benefits and protections, the states' refusal to license and recognize the marriages of same-sex couples also deprives these couples of intangible benefits that marriage has long provided to heterosexual couples.

A. Marriage Provides Older Heterosexual Couples With Significant Benefits

The marriage of an older man and an older woman is a frequent and joyous occasion. Each year, the states issue marriage licenses to about three-quarters of a million older people.[29] Such marriages account for approximately fifteen percent of all marriages.[30] As the population continues to age, the

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[29] In 2009, the most recent year for which relevant census data has been published, approximately 4.5 million people were married in the United States. Of these, approximately 418,000 men (18.3 percent of the men) and approximately 320,000 women (14.5 percent of the women) were aged 45 and over. This includes approximately 196,000 people between 55 and 64 years old, and approximately 86,000 people aged 65 or older. *See* U.S. Census Bureau, *American Community Survey Reports, Marital Events of Americans: 2009*, at p. 8, Table 2 (Aug. 2011), *available at* http://www.census.gov/prod/2011pubs/acs-13.pdf.

[30] *Id.; see also* D'Vera Cohn, et al., Pew Research Center, *New Marriages Down 5% from 2009 to 2010: Barely Half of U.S. Adults Are Married – A Record Low*, at 12 (Dec. 14, 2011),

number of marriages celebrated by older couples, and the percentage of all marriages involving older couples, are certain to increase.[31]

Marriage provides recognition, security, and mutual support, which are especially important to older people. As the Court has observed, marriage is "a far-reaching legal acknowledgement of the intimate relationship between two people." *Windsor*, 570 U.S. at __, 133 S. Ct. at 2692. Having the state recognize a marriage confers "a dignity and status of immense import." *Id.* Marriage also creates legal obligations, such as those that require one spouse to contribute to the care and support of the other.[32] As

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available at http://media.al.com/bn/other/Marriage-report-Pew-Research-Center-Dec-2011.pdf (In 2009 and 2010, approximately 16 percent of new marriages occurred in the 45+ age group.).

[31] Based on raw data compiled by the Census Bureau, and made available for public use, *Amici* have determined that, while the total number of marriages declined between 2009 and 2013, the number of people aged 45 and over married in 2013 increased to approximately 767,000. About 20.2 percent of the men and about 15.8 percent of the women married that year were aged 45 and over. This includes some couples in their eighties and nineties. *See, e.g.*, Margaux Laskey, *A Lifetime of Happiness, Part 2*, N.Y. Times (Jan. 27, 2013) (describing the marriage of 86-year-old Robert Haire and 97-year-old Ada Bryant).

[32] *See, e.g., Schweiker v. Gray Panthers*, 453 U.S. 34, 47 (1981) ("Congress treated spouses differently from most other relatives by explicitly authorizing state [Medicaid] plans to 'take into account the financial responsibility' of the spouse."); *see also* Tenn. Code Ann. § 39-15-101 (duty to support a spouse incapable of being self-supporting).

couples age, and health and financial resources wane, the security that marriage provides becomes increasingly important.

Studies by psychiatrists, gerontologists, and demographers have repeatedly confirmed the significant benefits that marriage provides to older heterosexual couples. Simply stated: Older married couples typically live healthier, happier, longer, and more prosperous lives than their unmarried peers.[33]

Married people typically are healthier than single people. "Married persons, on the whole, tend to have lower rates of fatal and nonfatal diseases, physical functioning problems, and disability compared to all other marital status groups."[34] There are good

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[33] *See* Linda J. Waite & Mary Elizabeth Hughes, *At Risk on the Cusp of Old Age: Living Arrangements and Functional Status Among Black, White and Hispanic Adults*, 54B J. Gerontology S136, S140 (1999) ("[M]arried couples [in their fifties and sixties] with and without children show the highest levels of functioning," on physical, cognitive, and emotional dimensions, when compared to their peers.). There does not appear to be any equally effective substitute for legally recognized marriage. "[C]ohabitation is associated with reports of lower social well-being than marriage. . . . One line of reasoning suggests that cohabitation represents an 'incomplete institution,' whereby it lacks formalized norms and its inhabitants are subject to social stigma." Adam Shapiro & Corey Lee M. Keyes, *Marital Status and Social Well-Being: Are the Married Always Better Off?*, 88 Social Indicators Research 329, 341-42 (2008).

[34] Amy M. Pienta et al., *Health Consequences of Marriage for the Retirement Years*, 21 J. Family Issues 559, 576 (2000); *see also id.* at 570 (married retired people less likely to have hypertension than unmarried retired people); I-Fen Lin & Susan L. Brown, *Unmarried Baby Boomers Confront Old Age: A National Portrait*, The Gerontologist, at 8 (2012) (unmarried

reasons for this. Whether out of commitment or in response to spousal pressure, married people are more likely to engage in "positive behaviors" such as exercising and abstaining from smoking.[35] Such conduct generally continues as couples age.[36]

Married people also are generally happier than single people. There is substantial evidence that, as a group, they have lower rates of depression, substance abuse, and alcoholism.[37] For example, one study found that never having been married was "associated with increased risk of major depression" in people aged 40 and over, and that not currently

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"baby boomers" twice as likely to report a disability as married baby boomers); Linda J. Waite & Maggie Gallagher, *The Case for Marriage: Why Married People are Happier, Healthier, and Better Off Financially* 60-61 (2000) ("[E]lderly married women – like their male counterparts – are much less likely than unmarried elders are to enter a nursing home.").

[35] Barbara Steinberg Schone & Robin M. Weinick, *Health-Related Behaviors and the Benefits of Marriage for Elderly Persons*, 38 The Gerontologist 618, 625 (1998).

[36] *Id.*

[37] *See* Adrianne Frech & Kristi Williams, *Depression and the Psychological Benefits of Entering Marriage*, 48 J. Health & Social Behavior 149, 149 (2007); *see also* Waite & Gallagher, *The Case for Marriage*, *supra* note 34, at 166-67 ("Older unmarried women, whether they lived alone, with their children or with others, were significantly more depressed than older married women . . . . Marriage held a similar advantage for older men.").

being married increased the risk of major depression in people aged 65 and older.[38]

Because married people are healthier and happier, they tend to live longer than single people.[39] One recent study estimated that married men tend to live eight to seventeen years longer than single men, while married women tend to live seven to fifteen years longer than single women.[40]

Finally, married people tend to be more prosperous than their unmarried peers.[41] Married men "work more hours and earn more individual income than do their peers who are cohabitating or

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[38] Tracey A. Lapierre, *Marital Status and Depressive Symptoms over Time: Age and Gender Variations*, 58(4) Family Relations 404, 406 (2009).

[39] *See* Lee A. Lillard & Linda J. Waite, *'Til Death Do Us Part: Marital Disruption and Mortality*, 100 Am. J. Sociology 1131, 1131 & 1148 (1995). ("The relationship between marriage and death rates has now reached the status of a truism." There is "a significant and sizeable mortality disadvantage for both men and women who are not married compared to the married.").

[40] Joan Raymond, "Single people may die younger, new study finds," NBCNews.com (http://www.nbcnews.com/id/44122528/ns/health-behavior/t/single-people-may-die-younger-new-study-finds/#.VPPoT3zF-Wg); *see* David Roelfs, et al., *The Rising Relative Risk of Mortality for Singles: Meta-Analysis and Meta-Regression*, Am. J. Epidemiology (2011).

[41] *See* Ron J. Hammond et al., *Resource Variations and Marital Status Among Later-Life Elderly*, 2 J. Applied Social Science 47, 58 (2008) (People who have never married "have fewer resources than the married elderly.").

single."[42] This contributes to the fact that married couples in their late sixties typically have almost ten times as much in financial assets as single people in the same age group.[43] For couples who live well into their eighties, median total household wealth is nearly five times higher for married couples than for their single peers.[44]

B. Marriage Benefits Older Same-Sex Couples As Much – If Not More – Than Older Heterosexual Couples

Older LGBT people confront the same challenges as other older people: declining health, loneliness, and reduced income. And older LGBT people seek to marry for the same reasons as other older people. Indeed, because older LGBT people face especially great physical, emotional, and financial challenges, the recognition, security, and mutual support that

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[42] *See* Robert Lerman and W. Bradford Wilcox, *Am. Enterprise Institute, For Richer, For Poorer: How Family Structures Economic Success in America*, at 43 (2014), *available at* http://www.aei.org/wp-content/uploads/2014/10/IFS-ForRicher ForPoorer-Final_Web.pdf.

[43] James Poterba, et al., Nat'l Bureau of Econ. Research, "Were They Prepared for Retirement? Financial Status at Advanced Ages in the HRS and AHEAD Cohorts," Working Paper 17824, at 6 (2012), *available at* http://www.nber.org/papers/w17824.pdf (for persons aged 65-69, median financial assets for two-person households is $111,6000 compared with $12,500 for single person households).

[44] *Id.* at 39 (median total household wealth $691,588 for oldest married couples compared to $141,606 for singles of the same age).

marriage provides may be even *more* beneficial for them than for other older adults.[45]

LGBT people tend to be in poorer physical health than their peers. Studies have found that there are "higher rates of diabetes, hypertension [and] disability . . . among aging gay men, lesbians, and bisexual people than among older straight adults."[46] Other "[s]tudies suggest higher levels of chronic and other health problems among LGBT older adults, including asthma, diabetes, HIV/AIDS, obesity, rheumatoid arthritis, and certain illnesses such as cancer."[47] While there are a number of reasons for the disparity, the American Medical Association has recognized that "exclusion from civil marriage contributes to health care disparities affecting same-sex households."[48]

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[45] Marriage equality is especially important for older same-sex couples because same-sex couples tend to marry at an older age than heterosexual couples. *See* M.V. Lee Badgett & Jody L. Herman, *Patterns of Relationship Recognition by Same-Sex Couples in the United States*, Williams Inst., at 9 (Nov. 2011).

[46] Erin Fitzgerald, *No Golden Years at the End of the Rainbow*, Nat'l Gay & Lesbian Task Force, at 12 (Aug. 2013), *available at* http://www.thetaskforce.org/static_html/downloads/reports/reports/no_golden_years.pdf.

[47] Movement Advancement Project, et al., *LGBT Older Adults And Health Disparities*, at 2 (Sept. 2010), *available at* http://www.lgbtmap.org/file/lgbt-older-adults-and-health-disparities.pdf.

[48] Am. Medical Ass'n, Policy Regarding Sexual Orientation, Policy H-65.973, *Health Care Disparities in Same-Sex Partner Households* (2009), *available at* https://www.ama-assn.org/ssl3/

As a group, LGBT people also "have worse mental health outcomes than their heterosexual counterparts."[49] Indeed, according to one study, LGBT people are two-and-one-half times more likely than other people to have a mental health problem during their lifetime.[50] There are at least two reasons for this. First, LGBT people "endure sexual minority-related stressors and challenges not experienced by heterosexuals," such as discrimination, rejection, difficulty accepting their sexual orientation, and the need to conceal their orientation from others.[51] Second, LGBT people have long been "denied access to legal marriage, which potentially could enhance their mental health in the same ways it does for heterosexuals."[52]

Finally, income disparities between LGBT and heterosexual people are significant. Contrary to popular belief, LGBT people are under-represented

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ecomm/PolicyFinderForm.pl?site=www.ama-assn.org&uri=/resources/html/PolicyFinder/policyfiles/HnE/H-65.973.HTM.

[49] Richard Wright, *Same-Sex Legal Marriage and Psychological Well-Being: Findings From the California Health Interview Survey*, 103(2) Am. J. of Public Health, 339 (Feb. 2013).

[50] Nat'l Alliance on Mental Illness, "Mental Health Issues Among Gay, Lesbian, Bisexual, and Transgender (GLBT) People", at 1 (June 2007), *available at* http://www2.nami.org/Content/ContentGroups/Multicultural_Support1/Fact_Sheets1/GLBT_Mental_Health_07.pdf.

[51] Wright, *Same-Sex Legal Marriage and Psychological Well-Being*, Am. J. of Public Health, *supra* note 49, at 339.

[52] *Id.*

at the top of the income pyramid and over-represented at the bottom.[53] A recent study reported that 15.9 percent of single gay men over 65 lived in poverty, compared to just 9.7 percent of single heterosexual men their age.[54] While older LGBT couples are less likely to live in poverty than LGBT singles, they are still more likely to be poor than their heterosexual peers. For example, 6.0 percent of lesbian couples 65 years of age and older have incomes below the poverty line compared to 3.5 percent for heterosexual married couples in the same age group.[55]

For older LGBT people, the problems of poor health and lower income are compounded by the fact that they often do not have as strong a social support network as their peers. As people age, many come to rely increasingly on family members, especially spouses and children, for assistance with medical and financial matters. LGBT elders, however, are twice as likely to live alone, half as likely to have

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[53] Gary J. Gates & Frank Newport, *Special Report 3.4% of U.S. Adults Identify as LGBT*, GALLUP, at 2 (Oct. 12, 2012), *available at* http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx (35 percent of LGBT adults had annual incomes under $24,000, compared to 24 percent of the total adult population; 16 percent of LGBT adults earned more than $90,000 a year, compared to 21 percent of the general population).

[54] M.V. Lee Badgett, et al., *New Patterns of Poverty in the Lesbian, Gay and Bisexual Community*, Williams Inst., at 9-10 (June 2013).

[55] *Id.* at 15.

close relatives to call for help, and four times less likely to have children to assist them.[56] As a result, "[w]hile family members related by blood or marriage play a primary role in the support of older adults in the general population, most LGBT older adults end up caring for one another."[57] Consequently, they are less able "to confront statistically higher rates of . . . poor mental health and physical disabilities."[58]

Given the unique challenges facing many older LGBT people, marriage could be even more beneficial to them than it has been for heterosexual couples. Indeed, there is evidence that marriage is already having a beneficial effect on same-sex couples.[59] If same-sex couples continue to be denied

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[56] *See* Movement Advancement Project, et al., *Improving the Lives of Older Adults*, at 6-7 (Mar. 2010), *available at* http://www.lgbtmap.org/file/improving-the-lives-of-lgbt-older-adults.pdf.

[57] *See* Karen Fredriksen-Goldsen, et al., *The Aging and Health Report*, at 51 (2011), *available at* http://caringandaging.org/wordpress/wp-content/uploads/2011/05/Full-Report-FINAL-11-16-11.pdf.

[58] Fitzgerald, *supra* note 46, *No Golden Years at the End of the Rainbow*, at 14.

[59] One study has found that "psychological distress might be lower among lesbian, gay, and bisexual persons in same-sex marriages compared with those not in any type of legally recognized same-sex union" and that "same-sex marriage might be the more beneficial legal arrangement for lesbian, gay and bisexual persons in terms of their mental health." Wright, *Same-Sex Legal Marriage and Psychological Well-Being*, Am. J. of Public Health, *supra* note 49, at 343-44. Another study found that same-sex couples living in states that recognize

the right to marry, however, many older same-sex couples will be condemned to lead less healthy, less happy, shorter, and less prosperous lives than their peers.

III. Allowing Older Heterosexual Couples To Marry *Despite* Being Non-Procreative, While Forbidding Older Same-Sex Couples From Marrying *Because* They Are Non-Procreative, Is Self-Evidently Irrational

As *Amici* have demonstrated, the states' refusal to license and recognize same-sex couples' marriages imposes heavy burdens on older same-sex couples. The states' primary justification for imposing these burdens is that, because same-sex couples cannot procreate, there is no reason for a state to "solemnize" and "subsidize" their unions. *DeBoer*, 772 F.3d at 407. However, as Justice Scalia has observed, "denying the benefits of marriage to homosexual couples" could not "possibly" be justified on the ground that the purpose of marriage is "the encouragement of procreation" because "the elderly are allowed to marry." *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting). Indeed, the fact that older heterosexual couples are allowed to marry, while older same-sex couples are not, vividly demonstrates that state prohibitions on marriage by

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same-sex marriages tend to be more financially secure than same-sex couples living in states that did not recognize same-sex marriages. Movement Advancement Project, et al., *Paying an Unfair Price: The Financial Penalty for Being LGBT in America*, at 10-11 (Nov. 2014), *available at* http://www.lgbtmap.org/file/paying-an-unfair-price-full-report.pdf.

same-sex couples deprive these couples of equal protection under the law.

The Court has made clear that, "even in the ordinary equal protection case calling for the most deferential of standards," a challenged "classification [must] bear a rational relationship to an independent and legitimate legislative end." *Romer v. Evans*, 517 U.S. 620, 632 (1996). Thus, even if limiting the benefits of marriage to couples capable of procreating were a legitimate goal – and *Amici* do not believe that it is[60] – "[t]he State may not rely on a classification whose relationship to [that] goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985).

Prohibiting same-sex couples from marrying is not a rational means to restrict the benefits of marriage to couples capable of procreation. Approximately 15 percent of the marriages entered into each year involve an older couple that is almost certainly incapable of procreation.[61] By contrast, if all legal restrictions are removed, same-sex couples are likely to account for two to four percent of all marriages.[62] A classification that allows a

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[60] *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965) (Constitution protects the rights of married couples *not* to procreate).

[61] *See supra* notes 29-31.

[62] Most studies estimate that LGBT people constitute about two to four percent of the population. *See, e.g., Gates, Special Report, supra* note 53 (noting that 3.4 percent of American adults self-identify as LGBT). Assuming that, if allowed to do

substantial number of older couples to marry *despite* being incapable of procreation, while preventing a small minority of older couples from marrying *because* they are incapable of procreation, clearly does not bear a rational relationship to the goal of restricting marriage to couples capable of procreation.

In any case, the states' justification for denying marriage licenses to same-sex couples is plainly pretextual. No state has ever sought to deny older heterosexual couples the right to marry on the grounds that their unions do "not run the risk of unintended offspring." *DeBoer*, 772 F.3d at 405. To the contrary, many states have gone out of their way to allow older heterosexual couples to marry.[63] For example, a number of states allow otherwise unlawful marriages *only* if the celebrants are too old (or otherwise unable) to procreate.[64] The states'

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so, LGBT people are likely to marry at about the same rate as other people, about two to four percent of all marriages will involve same-sex couples.

[63] *Cf. Turner v. Safely*, 482 U.S. 78, 98 (1987) (state's claim that it restricted inmates from marriage in order to advance its goal of fostering rehabilitation "suspect" because the state "routinely approved" requests to marry from male inmates, who constituted the majority of inmates, while virtually always denying female inmates' requests to marry).

[64] *See* Ariz. Rev. Stat. § 25-101 (first cousins may marry if both are at least 65 or older, or one is over 65 and the judge receives "proof . . . that one of the cousins is unable to reproduce"); 750 Ill. Comp. Stat. Ann. 5/212(f) (first cousins may marry if both are 50 or older or if either presents proof of being "permanently and irreversibly sterile"); Ind. Code Ann. § 31-11-1-2 (first cousins may marry if both are at least 65 years old); Utah Code

willingness to allow older heterosexual couples to marry demonstrates that they "must think marriage valuable for something other than just procreation." *Baskin v. Bogan*, 766 F.3d 648, 662 (7th Cir. 2014) (Posner, J.).[65]

The truth is clear: the states are refusing to license and recognize marriages involving older same-sex couples – alone among all older couples – solely because they are *same-sex* couples.[66] A state

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Ann. § 30-1-1(2) (first cousins may marry if both parties are 65 or older or, when both parties are 55 or older, if a judge finds that either party is unable to reproduce); Wis. Stat. § 765.03 (2014) (first cousins may marry if the female is 55 or older or "either party is permanently sterile").

[65] The Court has already recognized that marriage serves a number of "important and significant" purposes unrelated to procreation, including serving as an "expression[] of emotional support and public commitment" as well as a "precondition to the receipt of government benefits" and that these elements are sufficient to "form a constitutionally protected marital relationship." *Turner*, 482 U.S. at 95-96 (1987).

[66] *See Baskin*, 766 F.3d at 661 ("The state treats married homosexuals as would-be 'free-riders' on heterosexual marriage, unreasonably reaping benefits intended by the state for fertile couples. But infertile couples are free riders too. Why are they allowed to reap the benefits accorded marriages of fertile couples, and homosexuals are not?"); *see also Bostic v. Schaefer*, 760 F.3d 352, 382 (4th Cir. 2014) (highlighting "extreme underinclusivity" of state law that permits marriage among infertile heterosexual couples); *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1293 (N.D. Okla. 2014), *aff'd*, 760 F.3d 1070 (10th Cir. 2014) ("Same-sex couples are being subjected to a 'naturally procreative' requirement to which no other Oklahoma citizens are subjected, including . . . the elderly . . . . Rationality review has a limit, and this well exceeds it.").

law that serves no purpose other than "to impose a disadvantage, a separate status, and so a stigma," *Windsor*, 570 U.S. at __, 133 S. Ct. at 2681, on a small minority of older couples plainly does not serve a "legitimate legislative end," *Romer*, 517 U.S. at 633. Because the states' refusal to license or recognize marriages by same-sex couples is not rationally related to any legitimate governmental purpose, it deprives same-sex couples of their right to equal protection under the law

IV. Older Same-Sex Couples Should Not Have To Wait Any Longer To Enjoy The Benefits Of Marriage

LGBT people should not have to wait until "state democratic forces," *DeBoer*, 772 F.3d. at 407, decide that they can marry the person they love. Rather, "[m]inorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law." *Baskin*, 766 F.3d at 671. As demonstrated above, state provisions that prohibit licensing and recognition of marriages by same-sex couples cannot survive even the most deferential scrutiny. Therefore, the Court should now declare these provisions unconstitutional.

The need for the Court to protect the constitutional rights of older same-sex couples – many of whom are advanced in years and in declining health – is especially great. The long delay in licensing and recognizing marriages by same-sex couples has already caused many older couples to lose a lifetime's worth of tangible and intangible

benefits.[67] If the Court does not act, older same-sex couples will be forced to continue to wait until the day, if ever, when the states choose to rescind their unconstitutional marriage restrictions.[68] Even if that day arrives eventually, it will have come too late for many of them.[69]

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[67] Further delay will only compound the loss. Many federal benefits have a duration requirement. *See, e.g.*, 42 U.S.C. § 416(c),(g) (couple must be married for nine months before an employee's spouse is eligible to receive Spousal Survivors Benefits). As a result, the longer a couple must wait to marry, the greater the chance that they will not be able to obtain these benefits. *See, e.g.*, Ron Lieber, *After 58 Years in a Couple, a Spouse Fights for Benefits*, N.Y. Times (Mar. 21, 2014) (Surviving spouse, who married his same-sex partner of 58 years weeks after it became legal to do so in their state, denied Social Security Spousal Survivors Benefits because, at the time of his spouse's death, the couple had only been married for five months).

[68] The wait would likely be a long one. The State's marriage prohibitions have been incorporated into their state constitutions. The process of amending most state constitutions is a protracted and difficult one. In Tennessee, for example, a constitutional amendment may be approved either by legislative initiative or through a constitutional convention. Under the former procedure, the proposed amendment must be approved during two consecutive terms of the legislature, and must then be approved by the voters at the time of the next gubernatorial election. The latter procedure requires three consecutive statewide votes. *See* Tennessee Const. Art. XI, Sec. 3.

[69] *See, e.g., Gray v. Orr*, Case No. 1:13-cv-08449 (N.D. Ill.), Compl.,, ¶¶ 1-2 (DE 1) (64-year-old plaintiff likely to die from breast cancer prior to effective date for lifting of the state's ban on marriage by same-sex couples).

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the Court should reverse the decision of the United States Court of Appeals for the Sixth Circuit and find that the Fourteenth Amendment to the United States Constitution requires states to grant a marriage license to otherwise eligible same-sex couples and to recognize the marriage of same-sex couples lawfully performed out-of-state.

Respectfully submitted,

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